In the Supreme Court of the United States

October Term, 1940 No. 553.

JOSEPH C. LENIHAN and JOSEPH P. KILROY, in their own behalf as subscribers and users of the services of THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may care to join in this action, Petitioners,

and

CITY OF ST. PAUL, a municipal corporation, Intervener-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation,

and

CHARLES MUNN, HJALMAR PETERSEN and FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota, Respondents.

BRIEF OF RESPONDENTS CHARLES MUNN, ET AL, IN THEIR OFFICIAL CAPACITIES AS STATE OFFICIALS AND IN THEIR PRIVATE CAPACITY, IN OPPOSITION TO THE PETITION FOR CERTIORARI.

J. A. A. BURNQUIST, Attorney General,
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BRIEF OF RESPONDENTS CHARLES MUNN, ET AL, IN THEIR OFFICIAL CAPACITY AS STATE OFFICIALS AND IN THEIR PRIVATE CAPACITY, IN OPPOSITION TO THE PETITION FOR CERTIORARI.

SUMMARY OF OBJECTIONS TO PETITION AND CLAIM OF JURISDICTION

The petition of the petitioners herein does not set forth grounds upon which the jurisdiction of this Court properly may be invoked. The record fails to disclose that any substantial federal question was properly presented below, and none is presented in the petition to this Court.

Aside from the mere averment in the complaint that they were denied "due process", the petitioners can designate nothing in the record to show that they raised, substantiated, or pressed any federal question below. The opinion of the highest court of the state shows conclusively that no federal question was presented to it or was decided by it.

On the other hand, the record shows just as conclusively, that the individual petitioners brought their suit upon just two theories, both of which were adopted by the petitioner, City of Saint Paul, when it intervened later, namely: that the challenged rate order of the Railroad and Warehouse Commission was void because contrary (1) to procedural statutes of the state, and (2) to the prior telephone rate decision of the state supreme court in the case of **Tri-State Tel. & Tel. Co.**, 204 Minn. 516. The petitioners apparently were so confident of the correctness of their first theory and the effectiveness of the improper appeal in the second, particularly after the favorable decision of the trial court, that at no time did they seriously rely upon or urge their vague claim of "due process". The case was disposed of solely upon these two theories, obviously state questions only. Both were refuted and determined adversely by the state supreme court. The petitioners have made no move to amplify the record, or to correct any claimed error therein.

STATEMENT OF THE CASE

Since the case was determined on the pleadings, without findings of fact, and since the pleadings appear in the record, it is believed unnecessary to correct in detail the petitioners' statement. A concise, accurate statement of the facts is available in the opinion of the supreme court. (Proc. Sup. Ct., pp. 2-4)

It is necessary only to add that the petitioners' conclusion (Brief pp. 51-52) that these respondents, the railroad and warehouse commission of the state of Minnesota, its members individually in their official and in their private capacities, and the attorney general in his official and in his private capacity, "to all intents and purposes, acquiesced" in the erroneous judgment of the trial court because they took no appeal therefrom, is without foundation. The suit was in equity, entire in nature, and all of the parties defendant stood at all times on the same grounds. They were equally affected by the judgment of the trial court and by that of the supreme court which reversed the trial court.

The status of the petitioner city of Saint Paul is accurately described in the opinion of the state supreme court. (Proc. Sup. Ct., p. 18)

ARGUMENT

It is believed unnecessary to detail the objections against the petition or to cite the numerous decisions of this Court on the well-established rules applicable thereto. A mere averment of the denial of "due process" is not sufficient to invoke the jurisdiction of this Court. The question must be real and substantial, not fictitious. It must have essence and effect and not mere form. The petitioners made no effort to substantiate their claim. There was no allegation or specification of any right

claimed to be impaired. They did not rely upon or press their vague claim either in the trial or supreme courts.

On the contrary, as previously stated, the petitioners proceeded exclusively on two theories, involving only state questions, namely: (1) a proper construction of procedural statutes relating to telephone regulation in Minnesota, and (2) the validity of the commission's action with reference to a prior decision of the supreme court of the state.

As to the first point, their claim was substantially: that as subscribers they could invoke all the procedural statutes prescribed by state law in telephone rate controversies wherein the commission conducts an investigation of the companies' properties for the purpose of reducing rates and such investigation is accompanied by the customary adversary hearings and regulatory orders. In support of this claim petitioners cited only decisons involving adversary proceedings between regulatory bodies and utilities, in which the utilities claimed for themselves the benefit of such procedural statutes. All of these authorities were therefore distinguished as inapposite by the state supreme court which also referred to and quoted from a recent decision of the supreme court of Wisconsin on the same point. (Proc. Sup. Ct., pp. 12-16)

The petitioners failed to produce any authority supporting their claim. We have been unable to find any. The relatively few cases involving such claims are uniformly adverse to the contention. Included among these authorities, are two recent decisions of this Court:

Wright v. Central Ky. Nat. Gas Co., 297 U. S. 537.

Midland Realty Co. v. Kansas City P. & L. Co., 300 U. S. 109.

The following decisions are in accord:

St. Paul Book & Stat. Co. v. St. Paul Gas Light Co., 130 Minn. 71, 74, 76

In re: Northwestern Bell Telephone Company, 164 Minn. 279, 282

Phelps v. Logan Natural Gas Company, 101 Ohio St. 144

U. S. Light & Heat Corp. v. Niagara Falls etc., 47 Fed. (2d) 567

Birmingham v. Southern Bell Tel. Co., 234 Ala. 526

Brooklyn Gas Co. v. N. Y., 50 Misc. 450, 100 N. Y. S. 570

The reasoning of these authorities may be summarized briefly as follows:

That patrons and consumers of services rendered by utilities subject to governmental regulation have no vested right to any particular rates. That the consumers are represented by the public officials who draft the regulatory laws and those who administer them. That to permit every consumer to litigate rate matters within the jurisdiction of regulatory bodies would result in endless litigation and impose an intolerable burden on the courts. That effective public regulation would thereby be destroyed.

The other point raised below by the petitioners was that the commission's action was contrary to the mandate of the supreme court's prior decision. (Rec. p. 7, ff. 2, 3). The petitioners now seek to raise that point again before this Court. (Brief p. 35, assgns. Nos. 5 and 6). There is no need to add to what has been said above on this matter.

It is clear that both questions raised below by petitioners were and are state questions. They were so presented and relied upon by the petitioners. They were so treated by the supreme court which determined them adversely to the contentions of petitioners. After the final decision below, the petitioners did nothing to change the record or to inject the federal question.

Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673

Notwithstanding that petitioners had been granted an extension of time in which to file a petition for rehearing (Proc. Sup. Ct., p. 22), the petitioners subsequently waived any right to file such a petition (Proc. Sup. Ct., p. 26).

But even if it could be said that a federal issue was raised, it is not in this case a substantial question and could not properly invoke the jurisdiction of this Court. Innumerable decisions of this Court have established that if the decision below is plainly correct, or is not contrary to previous decisions of this Court, or if it is expressly foreclosed by previous decisions of this Court, no substantial federal question is presented for the purpose of reviewing decisions of the highest court of any state. All three of the elements mentioned are found in the case at bar.

(Authorities above cited.)

It is, therefore, respectfully submitted that the decision below is based solely upon questions of state law, a determination of which by the highest court of the state is final; that it is based upon non-federal grounds adequate to support it; that it is eminently correct and in accord with decisions of this Court; that the question sought to be presented herein by the petitioners is wholly frivolous and without substance; and that the petition should be denied for want of a properly presented substantial federal question.

Respectfully submitted,

J. A. A. BURNQUIST,
Attorney General,
ALFRED W. BOWEN,
Special Counsel,
Attorneys for Charles Munn, Hjalmar Petersen and Frank W. Matson as members of the Railroad and Warehouse Commission, The Railroad and Warehouse Commission of the State of Minnesota, and J. A. A. Burnquist, as Attorney General of the State of Minnesota,

GEORGE T. SIMPSON,
Special Counsel,
Attorney for Charles Munn, Hjalmar Petersen, Frank W. Matson and J. A. A. Burnquist, individually.

Dated at Saint Paul, Minnesota,
this 25th day of November, 1940.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 553.

JOSEPH C. LENIHAN AND JOSEPH P. KILROY, IN THEIR OWN BEHALF AS SUBSCRIBERS AND USERS OF THE SERVICES OF THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION, AND ON BEHALF OF ALL PERSONS, CORPORATIONS AND ASSOCIATIONS WITHIN THE METROPOLITAN AREA OF ST. PAUL, MINNESOTA, WHO ARE SIMILARLY SITUATED AND AS MAY CARE TO JOIN IN THIS ACTION, *Petitioners,*

and

CITY OF ST. PAUL, A MUNICIPAL CORPORATION, *Intervener-Petitioner,*

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION,

and

CHARLES MUNN, HJALMAR PETERSEN AND FRANK W. MATSON, INDIVIDUALLY AND AS MEMBERS OF THE RAILROAD AND WAREHOUSE COMMISSION, THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF MINNESOTA, *Respondents.*

BRIEF OF INTERVENER, CITY OF MINNEAPOLIS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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INDEX.

CASES CITED.

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BRIEF OF INTERVENER, CITY OF MINNEAPOLIS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

STATEMENT OF THE POSITION OF THE INTERVENER, CITY OF MINNEAPOLIS.

In order to clarify the position of the City of Minneapolis, which by formal complaint in intervention, not included in

the record presented to this court, except by reference (R. 121), appeared both in the District Court of Ramsey County and the Supreme Court of the State of Minnesota, we wish to supplement the statement of the petitioners.

The order of the Railroad and Warehouse Commission, which is the subject of the litigation, fixed telephone rates for subscribers in the City of Minneapolis in an amount approximately 12½% lower than those in existence at the time of the making of the order. The reduced rates are set out in the order (R. 32). The Tri-State Company furnishes telephone service in St. Paul, and the Northwestern Bell Telephone Company furnishes similar service in the City of Minneapolis. The reduction in the Minneapolis rates was accepted by the Northwestern Bell Telephone Company and by the Attorney General, representing the subscribers in the City of Minneapolis (R. 31).

The petitioners in this case are users of the telephone exchange and telephone service of the Tri-State Telephone Company within the St. Paul Metropolitan Area (R. 3). No user of telephone service in the City of Minneapolis attacked the order of the Railroad and Warehouse Commission. In the memorandum made a part of the order, the District Court of Ramsey County stated that the factual consequences of the order granting petitioners judgment on the pleadings are limited to the St. Paul area (R. 129).

The intervener, City of Minneapolis, is filing this brief because the assignments of error are broad enough to justify the conclusion that the petitioners are attacking the decision of the Supreme Court of the State of Minnesota in its entirety. They claim that the State Supreme Court erred in determining that the order was valid in so far as it affects the service rendered subscribers in the Minneapolis area by the Northwestern Bell Telephone Company, as well

as the service rendered subscribers in the St. Paul Metropolitan Area by the Tri-State Telephone Company (R. 33-38, Petition for Certiorari).

ARGUMENT.

In so far as the order reduces rates for telephone service furnished by the Northwestern Bell Telephone Company to subscribers in the City of Minneapolis, the decision of the Supreme Court presents no federal question. The rates, as reduced, were accepted by the Northwestern Bell Telephone Company. No user of the telephone service furnished by that company has attempted to attack the order of the Commission.

We submit that the petitioners did not, in the District Court or in the Supreme Court, properly raise a federal question. Their complaint was based on the theory that the statutes of the State of Minnesota required notice of the order, hearing, evidence and findings of fact. These claims were disposed of adversely to petitioners by the decision of the Supreme Court.

A careful reading of the opinion of the State Supreme Court compels the conclusion that its decision was based upon the ground that the Railroad and Warehouse Commission of the State possessed the power under the statutes of the State to make the order, Exhibit B, which was based on a valid agreement by both sides to end the litigation (R. 20, Proceedings in Supreme Court of Minnesota). There is presented, therefore, no grounds for review by this Court.

Mobile, Jackson, etc., R. R. Co. vs. Mississippi, 210 U. S. 187 (204).

The petition for the writ of certiorari for the first time

makes the claim that the statutes, as construed by the Supreme Court of this State, violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States (R. 17 and 37, Petition). This federal question is raised too late to permit a review in this Court, inasmuch as it was not made and passed upon in the Supreme Court.

McGoldrick, Comptroller, vs. Compagne Generale Transatlantique, 309 U. S. 430 (434).

Even if it might be said that a federal question is now presented, this question is not of any substantial merit.

Petitioners' claim that there is a federal question appears to be grounded upon their contention that as subscribers they have vested rights in the continuance of the rates in existence at the time the order of the Commission, Exhibit B, was made. This Court has held that no such vested right exists.

Wright vs. Central Kentucky Natural Gas Co., 297 U. S. 537 (542).

Midland Realty Co. vs. Kansas City P. & L. Co., 300 U. S. 109 (113).

The petition is not based upon the character of reasons which this Court by subdivision 5A of Rule 38 has indicated as special and important grounds for granting writs of certiorari.

Respectfully submitted,

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